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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1014

GEORGIA L. LUSK AND MYRON WIENER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1a–10a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 15, 1965. On January 12, 1966, the Chief Justice extended the time in which to file a petition for a writ of certiorari to February 13, 1966. The petition for a writ of certiorari was filed on February 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims properly held that petitioners, who were members of the War Claims

Commission, are not entitled to pay for a period following the abolition of the Commission.

STATUTES INVOLVED

The Reorganization Act of 1949, 63 Stat. 203, 5 U.S.C. § 133z (1952) provides in relevant part:

> SEC. 133z. DECLARATION OF OBJECTIVES AND PURPOSES OF REORGANIZATION PLANS.
>
> (a) The President shall examine and from time to time reexamine the organization of all agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:
>
> (1) to promote the better execution of the laws, the more effective management of the executive branch of the Government and of its agencies and functions, and the expeditious administration of the public business;
>
> (2) to reduce expenditures and promote economy, to the fullest extent consistent with the efficient operation of the Government;
>
> (3) to increase the efficiency of the operations of the Government to the fullest extent practicable;
>
> (4) to group, coordinate, and consolidate agencies and functions of the Government, as nearly as may be, according to major purposes;
>
> (5) to reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies or functions thereof as may not be necessary for the efficient conduct of the Government; and
>
> (6) to eliminate overlapping and duplication of effort.
>
> (b) The Congress declares that the public interest demands the carrying out of the pur-

poses specified in subsection (a) of this section and that such purposes may be accomplished in great measure by proceeding under the provisions of sections 133z to 133z–15 of this title, and can be accomplished more speedily thereby than by the enactment of specific legislation. (June 20, 1949, ch. 226, title I, § 2, 63 Stat. 203).

SEC. 133z–4. EFFECTIVE DATE OF REORGANIZATIONS SPECIFIED IN PLAN.

(a) Except as may be otherwise provided pursuant to subsection (c) of this section, the provisions of the reorganization plan shall take effect upon the expiration of the first period of sixty calendar days of continuous session of the Congress, following the date on which the plan is transmitted to it; but only if, between the date of transmittal and the expiration of such sixty-day period there has not been passed by either of the two Houses, by the affirmative vote of a majority of the authorized membership of that House, a resolution stating in substance that that House does not favor the reorganization plan.

* * * * *

(c) Any provision of the plan may, under provisions contained in the plan, be made operative at a time later than the date on which the plan shall otherwise take effect. (June 20, 1949, ch. 226, title I, § 6, 63 Stat. 205.)

SEC. 133z–5. DEFINITION OF "AGENCY."

When used in sections 133z to 133z–15 of this title, the term "agency" means any executive department, commission, council, independent

establishment, Government corporation, board, bureau, division, service, office, officer, authority, administration, or other establishment, in the executive branch of the Government, and means also any and all parts of the municipal government of the District of Columbia except the courts thereof. Such term does not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government. (June 20, 1949, ch. 226, title I, § 7, 63 Stat. 205.)

SEC. 133z–6. WHAT CONSTITUTES A "REORGANIZATION."

For the purposes of sections 133z to 133z–15 of this title the term "reorganization" means any transfer, consolidation, coordination, authorization, or abolition, referred to in section 133z–1 of this title. (June 20, 1949, ch. 226, title I, § 8, 63 Stat. 206.)

STATEMENT

Petitioners served as members of the War Claims Commission until President Eisenhower removed them from office in December 1953 [1] (Pet. App. 11a–12a).

On April 29, 1954, the President transmitted to Congress Reorganization Plan No. 1 of 1954, which abolished both the War Claims Commission and the International Claims Commission and transferred their functions to the newly created Foreign Claims Settlement Commission. 100 Cong. Rec. 5738, 5788. Neither

[1] Successors, named by recess appointment, were not confirmed by the Senate prior to the abolition of the War Claims Commission on July 1, 1954, discussed below.

House of Congress passed a resolution disapproving the plan. It therefore went into effect on July 1, 1954, pursuant to the Reorganization Act of 1949, *supra*.[2]

In August 1954, petitioner Wiener sued in the Court of Claims for salary from December 10, 1953 through June 30, 1954 (the day before the War Claims Commission was abolished). The Court of Claims dismissed the action. This Court reversed, holding that the attempted removal of Wiener had been unlawful. *Wiener* v. *United States*, 357 U.S. 349. The Court of Claims, on remand, entered judgment in favor of Wiener (Pet. App. 14a–15a). Petitioner Lusk filed a similar claim with the General Accounting Office and received payment (Pet. App. 15a).

On December 2, 1959, petitioners sued in the Court of Claims for salary from July 1, 1954 to March 31, 1955, the date the War Claims Commission would have expired by statute (Pet. App. 3a). They urged that the War Claims Commission was not abolished by Congress' acceptance of Reorganization Plan No. 1 of 1954, because (1) the Reorganization Act of 1949 does not authorize the President to abolish quasi-

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[2] In February 1954, petitioner Wiener had brought suit in the United States District Court for the District of Columbia, seeking a writ in the nature of *quo warranto* against the successor members of the War Claims Commission. The writ issued, but, after a hearing, it was quashed and the action was dismissed. Wiener filed an appeal (Pet. App. 12a–13a) which he agreed to dismiss on August 9, 1954 (Pet. App. 14a):

> "IT IS HEREBY AGREED between the parties hereto, inasmuch as the War Claims Commission has been abolished by Reorganization Plan No. 1 of 1954 (19 Fed. Reg. 3985) and this action has become moot, that the above-entitled cause be dismissed under Rule 21 * * *."

judicial agencies such as the War Claims Commission and (2) if the Act gives the President that power, it is unconstitutional. On cross-motions for summary judgment, the Court of Claims held that the Reorganization Act of 1949 does apply to quasi-judicial and quasi-legislative agencies, and that petitioners' claims are barred by laches in any event.

ARGUMENT

1. The Court of Claims interpreted the Reorganization Act of 1949 in accordance with its plain language and legislative history. The Act provides that the President "shall examine * * * all agencies of the Government," including independent establishments and commissions, to determine whether the interests of economy and efficiency require that they be reorganized or abolished (§§ 133z, 133z–5, 133z–6, *supra*). A plan of reorganization becomes effective sixty days after the President submits it to Congress unless a single House disapproves it by resolution of a majority "of the authorized membership" (§ 1332z–4(a), *supra*). Petitioners urged below that, despite these provisions, Congress did not intend independent agencies performing quasi-judicial or quasi-legislative functions to be subject to that procedure. The Court of Claims, however, correctly rejected the contention (Pet. App. 4a–6a). "Unlike its predecessor (the Reorganization Act of 1945), the 1949 act contained no express limitation with regard to the effects which a reorganization plan might have upon quasi-judicial or quasi-legislative functions" (Pet. App. 4a, n. 5). Congress eliminated the prior restriction upon the recommendations of President Truman and the

Hoover Commission. S. Rep. No. 232, 81st Cong., 1st Sess. pp. 2, 3–5; H. Rep. No. 23, 81st Cong., 1st Sess. pp. 3, 4–5. The House debates (95 Cong. Rec. 890–923) show that exemptions or special treatment for certain independent agencies (*e.g.*, the Federal Communications Commission, the United States Maritime Commission, and the Federal Power Commission (95 Cong. Rec. 910)) were considered, but were omitted from the Act as passed. See S. Rep. No. 232, *supra*, pp. 10–11, 12. Furthermore, when Reorganization Plan No. 1 of 1954 was submitted to Congress it brought little reaction; neither House attempted to block the abolition of the War Claims Commission. "Evidently the Congress felt the * * * [plan] was within the ambit of the statute * * *."[3] Cf. *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 15.

2. On the ground of decision ultimately adopted by the Court of Claims, it need not have reached the question of the scope of the 1949 Act, nor was it

[3] The Court of Claims' interpretation of the Reorganization Act of 1949 in no way conflicts with *Wiener* v. *United States*, 357 U.S. 349. That case was limited, as the opinion makes plain: "Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it" (357 U.S. at 356). In the present case, to the contrary, it would do violence to the Reorganization Act of 1949 to hold that Congress did not intend to authorize the President (with its concurrence) to reorganize independent as well as executive agencies (see Pet. App. 6a).

required to consider the constitutional issue raised by petitioners. The court below held that petitioners' claim was barred by laches in view of the five-year and five-month delay in bringing suit[4] (Pet. App. 6a–10a).

Since Reorganization Plan No. 1 of 1954 became effective on July 1, 1954, petitioner Wiener could have raised the matter of the reorganization in his first Court of Claims suit filed on August 20, 1954. However, he chose not to do so.[5] Petitioner Lusk did nothing until Wiener's successful prosecution of the previous case. In these circumstances, petitioners' suits were properly dismissed on account of unreasonable delay. *United States ex rel. Arant* v. *Lane,* 249 U.S. 367; *Nicholas* v. *United States,* 257 U.S. 71; *Norris* v. *United States,* 257 U.S. 77. Much shorter intervals than five years have often been held to foreclose litigation. *Arant, supra,* (22 months); *Morse* v. *United States,* 59 Ct. Cls. 139, 155 (14 months); *Grasse* v. *Snyder,* 192 F. 2d 35 (C.A.D.C.) (16 months);

[4] In the Court of Claims, the government also urged that petitioner Wiener was barred by the doctrine of res judicata or by the rule against splitting his cause of action; and that petitioner Lusk was barred because of accord and satisfaction. The Court of Claims did not consider these defenses because of its decision on other grounds (Pet. App. 10a), but of course the issues are left open.

[5] Rather, in his earlier petition for a write of certiorari, Wiener (Record in No. 52, 1957 Term, p. 5) represented that the War Claims Commission had been abolished "in manner provided for in the Reorganization Act of 1949 (5 U.S.C. 133Z–9) [sic] and all of the functions of the War Claims Commission and of the members thereof transferred to the Foreign Claims Settlement Commission of the United States."

Drown v. *Higley*, 244 F. 2d 744 (C.A.D.C.) (over 2 years); *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A. D.C.), certiorari denied, 361 U.S. 841 (33 months); *Plunkett* v. *United States*, 58 C. Cls. 359, 370 (37 months); *Evans* v. *Leedom*, 265 F. 2d 125 (C.A.D.C.), certiorari denied, 361 U.S. 935 (38 months). Moreover, prejudice to the government is far greater in this case than it is in the usual situation in which the doctrine of laches prevents "a dilatory plaintiff from recovering back salary for a lengthy period during which he rendered no service to the Government" (Pet. App. 8a). Here, petitioners in effect challenge the validity of governmental acts undertaken in relation to vast numbers of individuals. Petitioners' acquiescence in the abolition of the War Claims Commission and the transfer of its functions denied to the government an opportunity to remedy whatever defect (if any) might have existed in the reorganization. As the case was presented below, it was certainly within the sound discretion of the Court of Claims to invoke the equitable doctrine of laches.

3. The necessity of reaching the statutory and constitutional issues raised by petitioners is obviated for an additional reason which may be noticed although it was not argued below. Congress affirmatively adopted the reorganization shortly after the President's plan went into effect. It repealed the provision by which it had created the War Claims Commission and amended the War Claims Act to refer to the Foreign Claims Settlement Commission of the United States. Act of August 21, 1954, P.L. 615, 68 Stat. 759, 762. Congress then authorized the Foreign

Claims Settlement Commission to use funds previously appropriated for the administrative expenses of the War Claims Commission (68 Stat 815; 68 Stat. 1033, 1037). These statutes "confirmed and approved" the abolition of the War Claims Commission and the transfer of its functions to the Foreign Claims Settlement Commission.[6] *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 301–302. See, also, *Isbrandtsen-Moller Co.* v. *United States,* 300 U.S. 139, 147; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 631, n. 1 (concurring opinion of Mr. Justice Douglas), 635–637 (concurring opinion of Mr. Justice Jackson), 661, n. 3 (concurring opinion of Mr. Justice Clark). While we submit that the implementation of Reorganization Plan No. 1 of 1954 constituted a proper exercise of the combined powers of the President and Congress, the specific legislation which rapidly followed was, in any event, a complete ratification of the plan.[7]

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[6] Even before this legislation was approved, the Senate on July 23, 1954, received the President's nominations of the members of the Foreign Claims Settlement Commission. 100 Cong. Rec. 11597. All were confirmed by August 9, 1954. 100 Cong. Rec. 13586, 13733.

[7] If congressional ratification may be found from circumstances not amounting to specific legislation (see *Swayne & Hoyt, Ltd.* v. *United States*, *supra*), the affirmative action of Congress here should allow no room for doubt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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